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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1172

AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS,

Petitioner,

—v.—

BLUE CROSS OF FLORIDA, INC. and BLUE SHIELD OF FLORIDA, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January 31, 1974

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner American Family Life Assurance Company of Columbus respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 5, 1973.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 486 F.2d 225 and is attached hereto as Appendix A, *infra*, pp. 1a-11a. The opinion of the United States District Court for the Southern District

of Florida is reported at 346 F. Supp. 267 and is attached hereto as Appendix B, *infra*, pp. 12a-21a.

Jurisdiction

The judgment of the District Court was entered on July 27, 1972. The judgment of the Court of Appeals affirming the judgment of the District Court was entered on November 5, 1973. This petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

(1) Does a provision for "Coordination of Benefits" (COB) in group health insurance policies, concertedly adopted by respondents upon the recommendation of their trade associations and excluding small, specialist health insurance carriers from the market, constitute boycott, coercion or intimidation in violation of the antitrust laws?

(2) Does it remain the law of this Court that a boycott constitutes a *per se* violation of the antitrust laws?

(3) Is the determinative fact of the presence of a boycott exclusion from the market or is it instead the subjective intent to exclude a victim from the market?

(4) Does an otherwise illegal boycott become a legal method of exclusion from the market because the boycotting insurance companies deal in insurance with broader coverage than that sold by the boycotted insurance company?

(5) Does a boycott that would otherwise violate the Sherman Act, even under the business of insurance exemp-

tion in the McCarran-Ferguson Act, become legal because the boycotting provisions were approved by state insurance commissioners?

Statutory Provisions Involved

Section 1 of the Sherman Act, 26 Stat. 209 as amended, 15 U.S.C. §1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal: . . .

Section 16 of the Clayton Act, 38 Stat. 737, 15 U.S.C. §26, provides in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . .

Sections 2(b) and 3(b) of the McCarran-Ferguson Insurance Regulation Act, 59 Stat. 34 as amended, 15 U.S.C. §§1012(b) and 1013(b), provide in pertinent part:

> 2(b). No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance: *Provided,* that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

3(b). Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce or intimidate, or act of boycott, coercion, or intimidation.

Statement of the Case

The District Court had jurisdiction of the subject matter of this boycott action under the Clayton Act (15 U.S.C. §22), the Sherman Act and 28 U.S.C. §1337. Venue lay in the judicial district by virtue of the special venue provision of the Clayton Act (15 U.S.C. §22).

Invoking Section 1 of the Sherman Act, petitioner challenges the legality of the Coordination of Benefits provision ("COB"), a trade association-sponsored insurance provision eliminating claims payments by the COB carrier where a claimant has another policy covering the same risk. Application of COB requires insurers whose policies have no COB (such as petitioner's) always to pay first. COB is applied by respondents even though premiums have been collected for both policies. Respondents and other Blue Cross/Blue Shield companies and their trade associations call this portion of COB the "dumping clause" (the risk always is "dumped" on the non-COBing carrier); they so named it when they adopted COB in order themselves to avoid the economic exclusion from the market challenged by petitioner (App. 1233, 1236, 2716, 2849, 2870, 2879, 2896, 3419).* The District Court found that the "dumping clause" excluded petitioner from the market for supplementary insurance because customers refused to buy

* "App." refers to the Joint Appendix filed in the Court of Appeals.

or canceled petitioner's policies when respondents threatened to COB against them (pp. 17a-18a).

Developed initially by private accident and health carriers acting jointly through their trade associations, COB now appears in excess of 95% of all group insurance sold by Blue Cross/Blue Shield organizations and in excess of 90% of all group health insurance sold by private insurance companies. Because of its widespread adoption, COB has almost entirely eliminated the right of the over 145 million Americans covered by these group policies to select whatever health insurance coverage they deem necessary for themselves, and COB bars non-COB carriers such as petitioner from providing the needed medical coverage. See Point I, pages 7-11.

Petitioner is typical of the non-COB carriers which attempt to sell such needed additional coverage. Its primary business is the sale of cancer insurance.

Blue Cross and Blue Shield sell broad coverage group (accident and health service) plans primarily to employers in Florida. The many risks they cover include the risk of cancer. Effective August 17, 1964, admittedly acting jointly, the two respondents adopted the COB provisions, the legality of which the petitioner challenged under Section 1 of the Sherman Act.

Petitioner filed this boycott action on September 13, 1971, a few weeks after it first learned that respondents caused the City of Miami Beach to circulate two announcements to its employees. Each stated that respondents would COB against employees who were paid under petitioner's cancer plans sold to that group. Petitioner sought to enjoin respondents from invoking COB against petitioner's policyholders in the City of Miami Beach and throughout Florida.

After trial without a jury the District Court on July 27, 1972, filed its decision denying petitioner's claims and dismissing the case. The District Court held that petitioner was not entitled to an injunction because it failed to meet the burden imposed by *Apex Hosiery Company* v. *Leader*, 310 U.S. 469, 60 S. Ct. 982 (1940), of showing that it was respondents' competitor in sales of broad-risk group accident and health insurance (pp. 19a-20a). The District Court, however, in petitioner's favor, also found (a) that respondents themselves adopted COB because they had felt its exclusionary effects, and (b) that petitioner clearly had been excluded from the market for its two lowest-priced lines of cancer insurance (pp. 17a-18a).

The Court of Appeals filed its decision November 5, 1973. It also found that COB excluded petitioner from the market, and it accepted petitioner's argument that the District Court improperly relied upon *Apex*. Explicitly rejecting the reasons for the trial court's holding, it nonetheless denied injunctive relief to petitioner on the sole ground that COB constituted a "reasonable" restraint of trade (pp. 5a, 8a-10a).

Point I discusses the nationwide importance of the COB boycott. Respondents were among the first, if not the first, of the Blue Cross/Blue Shield plans to adopt COB, and the pressure on them to use COB after its approval in 1964 was overwhelming; by 1971 it was used in 98% of respondents' group plans (App. 2712). The amounts of claims respondents eliminated due to COB were astronomical; during 1971 alone, they totaled over 5.5 million dollars (App. 3796). This total only faintly suggests the scope and the multi-million dollar dimensions of the use of COB.

REASONS FOR GRANTING THE WRIT

I.

The provisions petitioner challenges are found in virtually all group insurance health policies covering more than 145 million Americans sold by Blue Cross/Blue Shield and by large private insurance companies and result in dominance of the health insurance market by COB users because of the boycott of outsiders the provisions create.

A definitive ruling by the Supreme Court on the issues raised here is urgently needed in the public interest because the decision below blocks exercise of the right of more than 145 million Americans to select health insurance coverage of their own choice. COB now appears in over 95% of Blue Cross/Blue Shield group plans covering some 61 million (*Research and Statistics Note 4,* U.S. Dep't of H.E.W., April 21, 1971, pp. 2, 4), and in over 90% of group policies issued by the accident and health insurance industry covering another 83.5 million Americans (*1972-73 Source Book of Health Insurance,* Health Insurance Institute, pp. 11, 19).*

The public interest in resolving whether or not COB creates a boycott because of its exclusionary effects is urgent and immediate. It seems highly unlikely that any

* The 145 million figure is greatly understated because the 61 million has a 1969 base and the 83.5 million a 1970 base. Moreover, the 95% figure for Blue Cross/Blue Shield is based upon a June, 1970 survey (App. 3315, 3317), and the 90% figure for private insurers is based upon questionnaires sent out June 29, 1965. *HIAA Group Insurance Bulletin 1-65,* September 21, 1965. Comparable figures for 1973 would be much higher in all four instances.

other victim of COB hereafter will be able to muster sufficient resources to challenge the legality of the use of COB by large and powerful insurance companies because the primary victims of COB are working couples who, almost without exception, are in the lower and middle income brackets.

The other victims of COB are health insurance companies like petitioner which provide various kinds of additional coverage for which there is a widespread and demonstrated need but which are excluded from the market because it is impracticable for them to adopt COB. The grim fact of life confronting non-COB carriers is that if they can't or won't join, they themselves must pay the claims otherwise paid by the numerous and dominant COB carriers. For example, 99% of all Blue Cross plans responding to a national survey had adopted COB for basic coverage as of June 1970, an increase of 23% over the number only 18 months earlier (App. 3317). Most of the private segment of the health industry (where COB originated) had earlier adopted COB to avoid this dilemma.

Because of the importance of COB to some 145,000,000 Americans, Blue Cross/Blue Shield might have been expected to challenge it. Such a challenge would have eliminated contrived defenses about "good" purposes, partial exclusion or partial competition between boycotters and victims. But instead, many Blue Cross/Blue Shield plans (including those of respondents) reluctantly began widespread use of COB in 1964, thus furthering a boycott with perhaps more pervasive effect than any other in our history. The two lower courts condoned the actions of Blue Cross/Blue Shield because they responded defensively for competitive reasons to avoid paying first under COB's "dumping clause" (App. 1233, 1236, 2716, 2849,

2870, 2879, 2896, 3419),* but it does a great disservice to the public to view this as a factor favorable to the respondents. Blue Cross/Blue Shield, by their own bitter experience with the "dumping clause" of COB used by their private competitors, were fully aware of the total exclusionary effects of COB on non-users at the time they adopted COB. Respondents should not be exonerated because they joined rather than fought their competitive carriers.

At most, then, the savings realized by respondents due to COB (if they exist at all) are comparable to the rebates offered for joining the conspiracy found to be illegal in *Standard Sanitary Mfg. Co.* v. *United States,* 226 U.S. 20, 47-48, 33 S. Ct. 9, 14 (1912). Certainly, to working couples and non-COB insurance carriers—the victims of COB—it matters not at all whether or not COB was adopted as an offensive or defensive competitive measure. The public interest in the resolution of the legality of COB by the Supreme Court was expressly recognized in 1971 by a different panel of judges in the Court of Appeals for the Fifth Circuit in another action brought by this petitioner against eight large private health insurance companies which were the primary instigators of COB. This matter reached the Court of Appeals on an application for a preliminary injunction. That Court declined to reach the merits of the issue of the legality of COB without the benefit of a full trial record because the question was "of

* Both lower courts recognized explicitly that the exclusionary effects of COB forced Blue Cross/Blue Shield to adopt it as a purely defensive measure in order to be competitive with the private carriers (pp. 5a, 17a). Thus the only real escape hatch from COB short of litigation is to join the COB conspiracy. "If you can't whup 'em, join 'em."

such importance that the losing party should have some opportunity to obtain review by the Supreme Court." *American Family Life Assur. Co. of Columbus* v. *Aetna Life Ins. Co.*, 446 F.2d 1178, 1181 (5th Cir. 1971).*

The record establishes that COB has operated to exclude petitioner's cancer insurance, a form of health insurance policy desperately wanted and needed by a large segment of the American population (App. 1400-01). Cancer, above all illnesses, probably is the most feared and expensive illness which can strike the home and the medical risk which is least protected against by normal group and other health insurance coverage. A recent study released by the National Cancer Foundation, Inc. entitled *The Impact, Costs and Consequences of Catastrophic Illness on Patients and Families* (March 1973) shows that chronic problems of underinsurance are posed when cancer strikes the household.** The cancer insurance problem is but one important aspect of the broader problems posed by the shocking inadequacy of health insurance coverage generally in face of rapidly rising expenses. For example,

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* On December 28, 1973, the trial court granted summary judgment to the defendants because of the circuit court's decision for which we seek review.

** This analysis of the costs of advanced cancer incurred by 115 families showed that 112 families had health insurance covering medical expenses of 2.5 times the family income (based on median figures, page 21), but nonetheless "[t]he inadequacy of medical insurance to cover catastrophic illness costs can be demonstrated. While 84.4% of the 115 families incurred total costs in excess of $10.000, only 39% received medical insurance payments of that amount or more" (page 25). Moreover, 30.4% of the families incurred expenses from $25,000 to over $50.000 (page 21), but only 6% received benefits over $25,000 (page 26). Although most insurance programs covered diagnostic and hospital costs, the necessary costs of care in the home created an "extreme financial burden" for the families of cancer patients (page 55).

a survey by the National Center for Health Statistics showed that "health insurance met only 42 per cent of all health care costs in 1971." Cong. Rec., Vol. 119, No. 146, pp. 1, 4-5 (October 2, 1973).

Thus the effect of the decisions in the courts below has been to sanction COB's exclusion of petitioner's cancer plans from the market notwithstanding that the plans unquestionably have proven need, proven social utility, and proven demand by a large segment of the American public.

II.

There exists widespread conflict among the circuits on the important question of whether a boycott is a *per se* violation of the antitrust laws despite controlling Supreme Court decisions uniformly requiring application of the *per se* rule.

The decision below precisely raises two situations contemplated by Rule 19(1)(b) of this Court: a court of appeals' decision (1) "in conflict with the decision of another court of appeals on the same matter," and (2) "in conflict with applicable decisions of this court."

The fact that for more than thirty years the *per se* rule has been uniformly applied to boycotts by this Court—most recently, in 1966—has not foreclosed circuit courts continually during the past seven years from considering and, sadly, too often from upholding, defenses to boycotts invoking the rule of reason, thus imposing far heavier burdens of proof on boycott victims than are normally imposed when *per se* antitrust violations are asserted. *Deesen* v. *Professional Golfers Ass'n of America*, 358 F.2d

165, 170 (9th Cir.), *cert. denied,* 385 U.S. 846, 87 S. Ct. 72 (1966); *Florists' Nationwide Tel. Del. Net.* v. *Florists' Tel. Del. Ass'n,* 371 F.2d 263, 269-70 (7th Cir.), *cert. denied,* 387 U.S. 909, 87 S. Ct. 1691 (1967); *Joseph E. Seagram and Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 77-79 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062, 90 S. Ct. 752 (1970); *Dalmo Sales Co. Inc.* v. *Tysons Corner Regional Shopping Ctr.,* 308 F. Supp. 988, 994 (D. D.C.), *aff'd,* 429 F.2d 206 (D.C. Cir. 1970); *Marjorie Webster Junior College* v. *Middle States Ass'n,* 432 F.2d 650, 654-55 (D.C. Cir.), *cert. denied,* 400 U.S. 965, 91 S. Ct. 367 (1970); *Bridge Corp. of America* v. *American Contract Bridge League,* 428 F.2d 1365, 1369 (9th Cir. 1970), *cert. denied,* 401 U.S. 940, 91 S. Ct. 940 (1971); *Cartrade, Inc.* v. *Ford Dealers Advertising Ass'n of Southern California,* 446 F.2d 289, 294 (9th Cir. 1971), *cert. denied,* 405 U.S. 997, 92 S. Ct. 1249 (1972); *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Com.,* 467 F.2d 178, 185-87 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109, 93 S. Ct. 912 (1973); *Worthen Bank & Trust Co.* v. *National BankAmericard Inc.,* 485 F.2d 119, 125-30 (8th Cir. 1973).

By contrast, approximately the same number of circuit court decisions rendered during the last seven years properly have applied the *per se* rule instead of the rule of reason to boycott claims. *Six Twenty-Nine Productions, Inc.* v. *Rollins Telecasting, Inc.,* 365 F.2d 478, 485-86 (5th Cir. 1966); *Miami Parts & Spring, Inc.* v. *Champion Spark Plug Co.,* 364 F.2d 957, 968 (5th Cir. 1966); *McBeath* v. *Inter-American Citizens for Decency Com.,* 374 F.2d 359, 361-62 (5th Cir. 1967), *cert. denied,* 389 U.S. 896, 88 S. Ct. 216 (1967); *Washington State Bowling Prop. Ass'n* v. *Pacific Lanes, Inc.,* 356 F.2d 371, 376 (9th Cir.), *cert. denied,*

384 U.S. 963, 86 S. Ct. 1590 (1966); *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049, 1058, 1066-69 (C.D. Cal. 1971), injunction of District Court reinstated *sub nom. Haywood* v. *National Basketball Ass'n*, 401 U.S. 1204, 91 S. Ct. 672 (1971) (Mr. Justice Douglas, Circuit Justice); *Moore* v. *Jas. H. Matthews & Co.*, 473 F.2d 328, 332 (9th Cir. 1972); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125, 93 S. Ct. 938 (1973); *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 882-83 (1st Cir. 1966); *Jones Knitting Corp.* v. *Morgan*, 361 F.2d 451, 459 (3d Cir. 1966); *United States Steel Corp.* v. *Fraternal Ass'n of Steel Haulers*, 431 F.2d 1046, 1048 (3rd Cir. 1970); *Premier Electrical Construction Co.* v. *Miller Davis Co.*, 422 F.2d 1132, 1137 (7th Cir.), *cert. denied*, 400 U.S. 828, 91 S. Ct. 56 (1970).

Within the framework of the conflict among the circuits concerning whether boycott is a *per se* violation there exist separate conflicts on the elements of boycott to be considered by the courts. First there is a conflict whether intent is a material element in showing boycott.* The Fifth Circuit has so held in this case (pp. 9a-10a). In addition, the Seventh and Eighth Circuits currently hold intent to be a material element in decisions concerning whether a boycott exists. *Florists' Nationwide Tel. Del. Net.* v. *Florists' Tel. Del. Ass'n*, 371 F.2d 263, 269-70 (7th Cir.), *cert. denied*, 387 U.S. 909, 87 S. Ct. 1691 (1967); *Worthen Bank & Trust Co.* v. *National BankAmericard Inc.*, 485 F.2d 119, 125-30 (8th Cir. 1973). The First and Ninth Circuits currently hold that intent and motivation

* Point III below demonstrates that the requirement of intent also conflicts with the applicable decisions of this Court.

are irrelevant to the decision whether a boycott exists. *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 882-83 (1st Cir. 1966); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125, 93 S. Ct. 938 (1973). See also, *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049, 1058, 1066-69 (C.D. Cal. 1971), injunction of District Court reinstated, *sub nom. Haywood* v. *National Basketball Ass'n*, 401 U.S. 1204, 91 S. Ct. 672 (1971).

Second, there is a conflict whether it is a material requirement to show that the plaintiff has been excluded from a market identical to that in which defendants operate.* In this case the Fifth Circuit has held for respondents on the ground that petitioner's business occupied only a small segment of the market for which respondents sold insurance (p. 10a). The First and Third Circuits have found no necessity that plaintiff show that he was excluded from the same market in which respondents operated. *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 882-83 (1st Cir. 1966); *United States Steel Corp.* v. *Fraternal Ass'n of Steel Haulers*, 431 F.2d 1046, 1048 (3rd Cir. 1970); *Jones Knitting Corp.* v. *Morgan*, 361 F.2d 451, 459 (3rd Cir. 1966).

Boycott victims have been forced to go to the roulette wheel on this important issue in spite of the fact that ever since 1941 it has been said to be rock-bottom Supreme Court doctrine that a boycott is illegal *per se*. *Fashion Originators' Guild of America, Inc.* v. *F.T.C.*, 312 U.S. 457, 468, 61 S. Ct. 703, 708 (1941); *Associated Press* v. *United States*,

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* Point IV below demonstrates that the requirement of identical markets also conflicts with the applicable decisions of this Court.

326 U.S. 1, 18, 65 S. Ct. 1416, 1424 (1945); *Northern Pac. Ry. Co.* v. *United States,* 356 U.S. 1, 5, 78 S. Ct. 514, 518 (1958); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 212, 79 S. Ct. 705, 709 (1959); *United States* v. *Parke, Davis & Co.,* 362 U.S. 29, 44, 80 S. Ct. 503, 512 (1960); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656, 659, 81 S. Ct. 365, 367 (1961); *White Motor Co.* v. *United States,* 372 U.S. 253, 259-60, 83 S. Ct. 696, 700 (1963); *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 347, 83 S. Ct. 1246, 1252 (1963); *United States* v. *General Motors Corp.,* 384 U.S. 127, 145-46, 86 S. Ct. 1321, 1330-31 (1966). Indeed, the *per se* approach to boycotts actually was used long before 1941. *Lawlor* v. *Loewe,* 235 U.S. 522, 535, 35 S. Ct. 170, 172 (1915); *Eastern States Retail Lumber Dealers Ass'n* v. *United States,* 234 U.S. 600, 610-11, 34 S. Ct. 951, 954 (1914); *W. W. Montague & Co.* v. *Lowry,* 193 U.S. 38, 46, 24 S. Ct. 307, 309-10 (1904).

The conflict among the circuits has occurred in spite of the fact that the Supreme Court's condemnation of boycotts as *per se* violations has been framed in words of bluntness and harshness not usually found in antitrust decisions. It held in *Klor's, supra* (359 U.S. at 212, 79 S. Ct. at 709):

> . . . They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." . . .

moving one eminent authority, not noted for his tenderness towards antitrust plaintiffs, to comment (Handler, "Recent Developments in Antitrust Law: 1958-1959," 59 Colum. L. Rev. 843, 862 (1959)):

> In its unanimous decision in *Klor's,* the Supreme Court rather bluntly and emphatically informed the lower courts that when in the past it proclaimed the *per se* unlawfulness of group boycotts, it meant precisely what it said. The prohibition is absolute. There are to be no exceptions, however extenuating may be the conditions generating the boycott.

In 1966, this Court most recently restated the rule in even more blunt terminology in *General Motors, supra* (384 U.S. at 146, 86 S. Ct. at 1331):

> . . . [I]t had long been recognized that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use," and that group boycotts are of this character. . . .

III.

There is a conflict with the applicable decisions of this Court on the important question of whether a boycott is to be measured by the effect of exclusion from the market or by the intent and purpose of the excluding companies.

The Fifth Circuit adopted the District Court's rulings that asserted innocent purpose overcomes exclusionary effect.

With respect to purpose (p. 5a):

> . . . [Respondents'] purpose was to avoid always paying first under the "dumping clause" of the Model COB provision which had been adopted on a widespread basis by the private insurance industry in 1963 and 1964. . . .

With respect to exclusionary effect (p. 5a):

> . . . [Respondents] applied the provision to the cancer policies of the [petitioner] . . . . Obviously, the employees would object to paying two premiums in order to obtain one coverage as to cancer, so 58 of the 119 employees either cancelled or allowed their American Family Life Cancer policies to lapse.

Further, with respect to both effect and purpose (p. 7a):

> . . . [T]he consequences of COB as applied to American Family Life was only a side effect of appellees' moves to remain competitive in their own broad group insurance market. . . .

The Fifth Circuit thus exculpated respondents from responsibility for exclusion of petitioner from the market because respondents' asserted purpose and motivation were innocent, *i.e.*, were to avoid always paying first and thus to avoid themselves being injured when competing with COB carriers in the market. This ruling is in clear conflict with the applicable decisions of this Court that defendants cannot concertedly exclude others from the market regardless of good purpose or intent.

This Court has repeatedly held that exclusionary effect is the controlling criterion in boycott cases and that asserted good intent and purpose are irrelevant. *United States* v. *General Motors Corp.*, 384 U.S. 127, 86 S. Ct. 1321 (1966); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1246 (1963); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S. Ct. 365 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S. Ct. 705 (1959); *Associated Press* v. *United States*, 326 U.S. 1, 65 S. Ct. 1416 (1945); *American Medical Ass'n* v. *United States*, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519, 63 S. Ct. 326 (1943); *Fashion Originators' Guild of America, Inc.* v. *F.T.C.*, 312 U.S. 457, 61 S. Ct. 703 (1941).

The Court said the following with respect to the Sherman Act's prohibitions in *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 49, 33 S. Ct. 9, 15 (1912):

> . . . Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results. . . .

In *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S. Ct. 365 (1961), the Court condemned as a boycott the refusal of gas companies to sell gas to purchasers of plaintiff's gas ranges which had not received seals of approval for safety from the American Gas Association. Defendants asserted that their purpose for denying the approval was to protect users of gas ranges. This Court made clear that competitors cannot concertedly refuse to deal with customers of a plaintiff on any grounds, even if based on safety, utility and durability. Businessmen who exercise power over whether a competitor's product can be sold to the public commit the *per se* violation of boycott. See also *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 347, 83 S. Ct. 1246, 1252 (1963).

Conduct rather than intent has always been the essential element of a *per se* offense. In *United States* v. *Masonite Corporation*, 316 U.S. 265, 275, 62 S. Ct. 1070, 1076 (1942) the Court said:

> . . . [A]s respects statements of various appellees that they did not intend to join a combination or to fix prices, we need only say that they must be held to have intended the necessary and direct consequences of their act and cannot be heard to say the contrary. United States v. Patten, 226 U.S. 525, 543.

Mr. Justice Jackson stated of the Sherman Act in *Krulewitch* v. *United States*, 336 U.S. 440, 452, 69 S. Ct. 716, 722 (1949):

> . . . In civil proceedings this Court frankly has made the end a test of the means, saying: "To require a greater showing would cripple the Act," . . . in dispensing with the necessity for specific intent to produce a result violative of the statute. . . .

IV.

There is a conflict with the applicable decisions of this Court on the important question of whether it is a boycott to exclude a victim from only a portion rather than the whole of the market served by the boycotting companies.

The Fifth Circuit held that the seller of a policy covering a single risk could not complain of the exclusionary effect of COB provisions in policies covering many other risks in addition to such single risk (p. 10a):

> . . . Blue Cross-Blue Shield writes such [cancer] coverage only as incidental to or as a part of its broad coverage which protects the insured as to many diseases or disabilities. . . .
>
> This may be tough competition for American Family Life, which chooses to concentrate on only one dread risk, . . . We cannot say under §1 of the Sherman Act that an insurance company insuring against only one risk is entitled to dictate the terms upon which broad risk companies may offer their benefits to those individuals who need protection against many risks.

The Fifth Circuit thus held that a claim of boycott was defeated because respondents' exclusionary practice applied to a broad spectrum of the market in which petitioner's entire business occupied only a small portion.

This ruling is in clear conflict with the applicable decisions of this Court that exclusion from any substantial portion of the market is sufficient to show a boycott. *United States* v. *General Motors Corp.*, 384 U.S. 127, 86 S. Ct. 1321 (1966); *Silver* v. *New York Stock Exchange*, 373 U.S.

341, 83 S. Ct. 1246 (1963); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S. Ct. 705 (1959); *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 9, 78 S. Ct. 514, 520 (1958); *Associated Press* v. *United States*, 326 U.S. 1, 65 S. Ct. 1416 (1945).

In *Klor's* a single merchant brought suit against "a wide combination consisting of manufacturers, distributors and a retailer" (359 U.S. at 213, 79 S. Ct. at 710). The defendants sold many products in many locations; the combination was struck down by reason of their boycott of only one small dealer in electrical appliances. In rejecting the earlier requirement that broad public injury be shown to support antitrust charges, the Court stated with respect to this combination (*id.*):

> . . . [I]t is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction make little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. . . .

Only the slightest portion of the attention of the New York Stock Exchange is directed at regulating the private wire connections of its members, and it is possible for members to deal with over-the-counter dealers other than by means of private wires. Yet it was stated in note 5 of *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 348, 83 S. Ct. 1246, 1252 (1963):

> . . . Nor does any excuse derive from the fact that the collective refusal to deal was only with reference to the private wires, the member firms remaining willing to deal with petitioners for the purchase and sale of

> securities. [Citations] A valuable service germane to petitioners' business and important to their effective competition with others was withheld from them by collective action. That is enough to create a violation of the Sherman Act. . . .

In *Associated Press* v. *United States,* 326 U.S. 1, 18, 65 S. Ct. 1416, 1423 (1945), the Court stated:

> . . . But the fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman Act. . . .

In *Paramount Famous Lasky Corp.* v. *United States,* 282 U.S. 30, 44, 51 S. Ct. 42, 45 (1930), the Court said:

> In order to establish violation of the Sherman Anti-Trust Act it is not necessary to show that the challenged arrangement suppresses all competition between the parties . . . .

The fact that the injured party sells only one of many products sold by defendants has never constituted a defense under the antitrust laws, *Perkins* v. *Standard Oil of Calif.,* 395 U.S. 642, 89 S. Ct. 1871 (1969); *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 83 S. Ct. 1246 (1963); see also the two-product tying cases, *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495, 89 S. Ct. 1252 (1969); *United States* v. *Loew's, Inc.,* 371 U.S. 38, 83 S. Ct. 97 (1962); *Northern Pac. Ry. Co.* v. *United States,* 356 U.S. 1, 78 S. Ct. 514 (1958); *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 73 S. Ct. 872 (1953).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the Fifth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3447

AMERICAN FAMILY LIFE ASSURANCE CO. OF COLUMBUS,

Plaintiff-Appellant,

—versus—

BLUE CROSS OF FLORIDA, INC., and
BLUE SHIELD OF FLORIDA, INC.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(November 5, 1973)

Before BROWN, Chief Judge, COLEMAN and DYER, Circuit Judges.

COLEMAN, Circuit Judge: The American Family Life Assurance Company of Columbus, Georgia, sued Blue Cross and Blue Shield of Florida. The complaint charged

that enforcement of a "coordination of benefits" provision contained in defendants' plans for hospital and surgical benefits violated Section 1 of the Sherman Act, 15 U.S.C. §1. Specifically, it was urged that the practice constituted boycott, coercion, intimidation, and other prohibited restraints of trade. A plan covering the municipal employees of Miami Beach was especially challenged.

After a Bench trial on the merits, the District Court dismissed the complaint, *American Family Life Assurance Company of Columbus* v. *Blue Cross of Florida, Inc.*, 346 F.Supp. 267 (S.D., Fla., 1972). We affirm.

It is to be noted that prior to the beginning of this litigation plaintiff had sought temporary and permanent injunctive relief against eight large commercial health insurance carriers in the Northern District of Georgia. That case was reviewed by this Court as to the denial of preliminary injunctive relief and the denial was affirmed, *American Family Life* v. *Aetna Life Insurance Company*, 5 Cir., 1971, 446 F.2d 1178. That decision, of course, did not go to the merits.

The primary business of American Family Life is the sale of cancer plan insurance policies which provide for payment solely in the event of certain expenses incurred in connection with a confirmed diagnosis of cancer. Such payments are made regardless of any benefits paid on the same risk by other insurance companies.

Blue Cross, a non-profit corporation, operates a hospital service plan.

Blue Shield, likewise a non-profit corporation, operates a medical or surgical plan.

Although there is some cavil to the contrary, both of these defendants are clearly subject to the supervision and regulation of the Florida Department of Insurance.

The coordination of benefits, sometimes referred to as "COB", is at the heart of the controversy. COB simply means that if the same hospital, surgical, or medical risk is covered by more than one insurance carrier then the company insuring with a COB provision in its policies may reduce the amount of its payments by that payable from some other coverage. In other words, the claimant may not recover twice for the same expenses. If more than one policy of insurance has a COB provision then the primary carrier rule is applied.

The District Court described COB as follows:

> "Adoption of a model COB provision was recommended in December 1962 by four trade associations of private health insurance companies, namely, the Health Insurance Association of America, the Life Insurance Association of America, the American Life Convention, and the Health Insurance Council. COB has as its primary characteristic a structure of priority of claim payments which enables *broad risk accident and health insurance carriers* to reduce the amount of premiums paid out by limiting the claimants to a single payment of benefits for a single medical risk.
>
> "If two or more policies would result in payment for more than 100% of the expenses, then coordination of benefits is applied. If, therefore, as is not infrequently the case in the event of a serious injury or illness, two or more policies, with or without coordination of benefits, provide together total benefits less than the expenses, coordination is not applied. For example, if as a result of a serious illness, hospital and medical expenses of $10,000 are incurred, and under two group policies a total of $7,500 is avail-

able, coordination of benefits would not apply at all. If hospital and medical expenses of $1,000 are incurred and $800 is available under one policy and $800 under another, and if either one or both of the policies have a coordination of benefits clause, then rather than paying $1,600, the total benefits under both policies would be limited to $1,000 by application of the coordination of benefits clause or clauses.

"When both policies have a coordination of benefits clause, then an order of benefits rule—the primary carrier rule—is applied. Under these rules, for example, the husband's carrier is considered primary and the wife's carrier secondary so that in the example, the husband's carrier would pay $800 and the wife's carrier would pay only $200 to bring the total up to 100%. When only one of the policies has a coordination of benefits clause, then the carrier without a coordination of benefits clause, such as the plaintiff, would always be deemed primary. This is known as the automatic primary rule or the dumping clause.

"The carrier without a coordination of benefits clause pays no more in that event than it has obligated itself to pay by its policy contract and the operation of the automatic primary rule or dumping clause cannot cause such a company to pay more than it would pay whether or not the other company had a coordination of benefits clause."

With the approval of the Insurance Commissioner of Florida (as the District Court found), the appellees began to write group hospital and group medical or surgical service plans with a coordination of benefits provision. They have continued also to write this coverage

without coordination of benefits provisions and a substantial number of subscribers are covered by such group contracts.

The District Court expressly found that the initiation of the COB provisions was done without any intent to harm the plaintiff's business, but rather was done so that Blue Cross and Blue Shield could remain competitive in the field of broad risk group health and accident insurance; the purpose was to avoid always paying first under the "dumping clause" of the model COB provision which had been adopted on a widespread basis by the private insurance industry in 1963 and 1964. The "dumping clause" is the portion of the Blue Cross-Blue Shield COB plan to which American Family Life objects.

American Family Life contends that its allegations of boycott are supported by what took place in Miami Beach. Since January, 1967, the appellees have provided group health and accident insurance coverage for the employees of the City of Miami Beach. The contract with the city includes a COB provision, so required by the city in its specifications for bids on the coverage.

The District Court thought there was "serious question" as to whether American Family Life sells group insurance as that term is used in the Blue Cross-Blue Shield insurance contract with Miami Beach employees; nevertheless, the appellees applied the provision to the cancer policies of the appellant because they were sold through a franchise group (payroll payment) plan. Obviously, the employees would object to paying two premiums in order to obtain one coverage as to cancer, so 58 of the 119 employees either cancelled or allowed their American Family Life cancer policies to lapse.

The Court proceeded to find, however, that:

> "A single-risk policy such as the Cancer Plan covers *only one risk of disease in the vast* market of policies covering medical risks, and the number of times the Blue Cross-Blue Shield COB provision is applied against plaintiff's policy is necessarily minuscule as compared with the payments made under the broad-risk policies. This is true since a concurrence of three factors must occur before such an application of COB is made by the defendants. The insured must be covered by the plaintiff's policy and that of the defendants, and the insured must have purchased his cancer risk policy from the plaintiff through a franchise group (payroll payment) plan."

American Family Life contended that the application of the Blue Cross-Blue Shield COB to their policies in Miami Beach constituted a boycott and amounted to a restraint of trade within the terms of Section 1 of the Sherman Act.

Blue Cross-Blue Shield took the position that there was no competition between them and American Family Life, hence there could be no violation of Section 1 because there was no restriction or abridgment of competition in the market place.

From the record before us it is evident that Blue Cross-Blue Shield do compete with commercial insurance companies engaged in *broad risk* hospital and medical insurance.

At the trial, American Family Life's President testified that his company does not engage in the general health and accident business in Florida, it does not sell cancer

policies in Florida in competition with appellees (who write broad risk coverage), and it does not make any effort to write or sell cancer policies in Florida as a substitute for the insurance coverage sold there by the appellees.

The District Court held that American Family Life's cancer insurance business was not competitive in Florida with the broad group hospital, medical, and surgical coverage written by Blue Cross-Blue Shield; that the consequences of COB as applied to American Family Life was only a side effect of appellees' moves to remain competitive in their own broad group insurance market. Therefore, said the Court, appellants had shown no entitlement to Sherman Act Section 1 relief, citing *Apex Hosiery Company* v. *Leader*, 310 U.S. 469 (1940), and *Prepmore Apparel, Inc.* v. *Amalgamated Clothing Workers of America*, 5 Cir., 1970, 431 F.2d 1004.

The Court recognized that *Apex* was factually dissimilar but relied on the specific language therein appearing that:

> "Labor cases apart, which will presently be discussed, this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition. In the cases considered by this Court since the Standard Oil Company case in 1911 some form of restraint of commercial competition has been the sine qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act . . . "

American Family Life, the appellant, now seeks reversal on the following grounds:

1.

The District Court erred in holding that there must be competition in order to have a Sherman Act Restraint of Trade;

2.

Even if competition is an indispensable prerequisite, the finding that there was no competition is clearly erroneous;

3.

The findings that American Family Life was not excluded from the cancer insurance market, that Blue Cross-Blue Shield did not intend to injure American Family Life, and that there was no coercion or intimidation are clearly erroneous; and finally,

4.

Blue Cross-Blue Shield are not exempt from the Anti-Trust Laws by reason of the McCarran-Ferguson Act, 15 U.S.C., §§1011-1013.

Blue Cross-Blue Shield respond that the fundamental principle expressed by *Apex,* and not yet abandoned by the Supreme Court, is that some form of restriction or suppression of competition is the *sine qua non* of Section 1 of the Sherman Act. They admit that one does not have to be a competitor to bring a Section 1 suit, as, for example, a purchaser is not in competition with a seller but he may be injured by the restriction or suppression of competition

between the seller and others and thus may invoke the benefits of the Sherman Act.[1]

The acts, practices, methods, and operations of the respective insurance company litigants are not in dispute. The disagreement centers on the consequences—anti trust or no anti trust. In this setting we raise *sua sponte* the principle that a judgment which is correct in ultimate effect will not be disturbed on appeal even if the lower court relied on the wrong ground or gave an untenable reason for its decision, *Texaco, Inc.* v. *Holsinger*, 10 Cir., 1964, 336 F.2d 230, cert. denied 379 U.S. 970; *Mindes* v. *Seaman*, 5 Cir., 1971, 453 F.2d 197; *McLain* v. *Lance*, 5 Cir., 1945, 146 F.2d 341, cert. denied 325 U.S. 855.

We think the correct standard for the determination of the issue now before us was enunciated by the Third Circuit in *The Travelers Insurance Company* v. *Blue Cross of Western Pennsylvania*, [No. 72-1209, slip opinion dated July 10, 1973], —— F.2d ——:

> "The anti trust laws, however, protect competition, not competitors; and stiff competition is encouraged, not condemned."

This statement was preceded by the observation that:

> "In its negotiating with hospitals, Blue Cross has done no more than conduct its business as every na-

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[1] The appellees also argue *in extenso* that the situation *sub judice* is governed by the McCarran-Ferguson Act because they are regulated by the Insurance Commission of the State of Florida and are not guilty of a boycott. McCarran-Ferguson provides that insurance business where regulated by state law is excluded from Sherman Act coverage in the absence of agreements or acts of boycott, coercion, or intimidation. The District Court made no findings of fact or conclusions of law on this point. Consequently, we intimate no opinion thereon.

> tional enterprise does, i.e., get the best deal possible • • • Blue Cross passes along the saving thus realized to consumers."

That is the situation here. American Family Life does not write broad coverage hospital and medical insurance. Blue Cross-Blue Shield do write such coverage. American Family Life sells cancer plan policies. Blue Cross-Blue Shield writes such coverage only as incidental to or as a part of its broad coverage which protects the insured as to many diseases or disabilities. When they include COB in their policies these companies are simply providing that to a certain extent they shall not make the payments received or to be received from some other insurance policy, thus reducing the cost of their broad risk coverage as well as its cost to the insured.

This may be tough competition for American Family Life, which chooses to concentrate on only one dread risk, but the test is whether any restraint of trade thus caused is reasonable, *Northern Pacific Railway Company* v. *United States*, 356 U.S. 1 (1958). In our opinion, there is no logical way in the context of this case by which the COB provisions can be pronounced "unreasonable". We cannot say under §1 of the Sherman Act that an insurance company insuring against only one risk is entitled to dictate the terms upon which broad risk companies may offer their benefits to those individuals who need protection against many risks.

Stated another way, may the Blue Cross-Blue Shield COB provisions be invalidated under the Sherman Act so that American Family Life may write its cancer policies in the form it desires while at the same time denying the same right to Blue Cross-Blue Shield as to broad coverage? We think not, and we so hold.

While the District Court apparently chose to base its dismissal on "no competition", we base ours on the view that the record fails to reflect any prohibited competition.

In this context we attribute no controversial significance to what occurred as to the contract with the City of Miami Beach. There the insurer asked for bids on coverage that would include COB provisions. American Family Life did not offer a bid. It does not write the type of insurance which the purchasers desired.

The Judgment of the District Court is AFFIRMED.

APPENDIX B

Judgment and Opinion of the United States District Court for the Southern District of Florida

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

No. 71-1423-Civ.-PF

AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS,

Plaintiff,

—VS.—

BLUE CROSS OF FLORIDA, INC., and BLUE SHIELD OF FLORIDA, INC.,

Defendants.

Memorandum Opinion and Final Judgment

July 27, 1972

FAY, *District Judge*:

Plaintiff American Family Life Assurance Company of Columbus (AFL) is a corporation incorporated under the laws of the State of Georgia and has its principal place of business in Columbus, Georgia. AFL is engaged in interstate commerce by virtue of its insurance transactions across state lines and is licensed to do business in forty-two states, including Florida. Its primary business is the

sale of cancer plan insurance policies providing for payment solely in the event of certain expenses incurred in connection with a confirmed diagnosis of cancer, subject to exercise of certain options by its policy holders. Payment is made regardless of what benefits, if any, are paid by other insurance companies on the same risk. Defendant, Blue Cross of Florida, Inc. (Blue Cross) and defendant, Blue Shield of Florida, Inc. (Blue Shield) are both nonprofit Florida corporations. Blue Cross operates a hospital service plan and Blue Shield operates a medical or surgical service plan. Both defendants operate these plans throughout the State of Florida under Chapters 624-632 and 641 of the Florida Statutes and are subject thereunder to supervision and regulation by the Department of Insurance of Florida. The business activities of each defendant extend throughout the United States and constitute a continuous flow of commerce among the several states of the United States.

The complaint consists of two claims. In the first claim plaintiff alleges that defendants adopted and thereafter administered their coordination of benefits provisions in an unlawful conspiracy to boycott between themselves and other companies within the Blue Cross/Blue Shield structure at the national and local levels. The second claim alleges a similar and related conspiracy to boycott between defendants, other Blue Cross/Blue Shield plans and their trade associations, and private health companies and their trade associations. Both alleged conspiracies to boycott allegedly have as their purpose and effect to exclude the plaintiff from vast segments of the market in Florida for its franchise cancer plan policies. The Court has jurisdiction of this subject matter under the Clayton Act (15

U.S.C.A. § 22), the Sherman Act, and 28 U.S.C.A. § 1337. Venue lies in this judicial district by virtue of the special venue provisions of the Clayton Act, 15 U.S.C.A. § 22. Defendants transact business in this judicial district and their activities affect interstate commerce.

The plaintiff originally sought treble damages under Section 4 of the Clayton Act, 15 U.S.C.A. § 15, and injunctive relief under Section 16 of the Clayton Act, 15 U.S.C.A. § 26, but waived its right to a jury trial and abandoned its claim for treble damages except in the nominal amount of $5.00 and seeks an injunction prohibiting defendants from using or applying its coordination of benefits provision against the plaintiff's franchise cancer plan policies. However, the plaintiff claims that by showing injury to its property or business it is qualified for an award of reasonable attorney fees.

At the heart of this controversy is the coordination of benefits provision or COB as it is more commonly known. Adoption of a model COB provision was recommended in December 1962 by four trade associations of private health insurance companies, namely, the Health Insurance Association of America, the Life Insurance Association of America, the American Life Convention and the Health Insurance Council. COB has as its primary characteristic a structure of priority of claim payments which enables broad risk accident and health insurance carriers to reduce the amount of premiums paid out by limiting the claimants to a single payment of benefits for a single medical risk. If two or more policies would result in payment of more than 100% of the expenses, then coordination of benefits is applied. If, therefore, as is not infrequently the case in the event of a serious injury or illness, two or more policies,

with or without coordination of benefits, provide together total benefits less than the expenses, coordination is not applied. For example, if as a result of a serious illness, hospital and medical expenses of $10,000 are incurred, and under two group policies a total of $7,500 is available, coordination of benefits would not apply at all. If hospital and medical expenses of $1,000 are incurred and $800 is available under one policy and $800 under another, and if either one or both of the policies have a coordination of benefits clause, then rather than paying $1,600, the total benefits under both policies would be limited to $1,000 by application of the coordination of benefits clause or clauses. When both policies have a coordination of benefits clause, then an order of benefits rule—the primary carrier rule—is applied. Under these rules, for example, the husband's carrier is considered primary and the wife's carrier secondary so that in the example, the husband's carrier would pay $800 and the wife's carrier would pay only $200 to bring the total up to 100%. When only one of the policies has a coordination of benefits clause, then the carrier without a coordination of benefits clause, such as the plaintiff, would always be deemed primary. This is known as the automatic primary rule or the dumping clause. The carrier without a coordination of benefits clause pays no more in that event than it has obligated itself to pay by its policy contract and the operation of the automatic primary rule or dumping clause cannot cause such a company to pay more than it would pay whether or not the other company had a coordination of benefits clause.

On December 1, 1963, the Blue Cross and Blue Shield plans in the Southeastern United States began to administer a group contract with Southern Bell. The Southern

Bell contract, awarded through competitive bidding on specifications prepared by Southern Bell, contained coordination of benefits provisions and in accordance with that contract the defendants applied certain order-of-benefits rules. Beginning on August 24, 1964, and after much discussion and exchange of information between themselves, the Blue Cross Association, local Blue Cross and Blue Shield plans operative outside Florida and with private health insurance companies, defendants began to generally apply the same order-of-benefit rules in determining the amounts payable under most of their group contracts containing coordination of benefits provisions although their riders did not themselves contain those order-of-benefit rules. Subsequently, with the approval of the Insurance Commissioner of Florida, the defendants began to make available and write group hospital and group medical or surgical service plans with an anti-duplication or coordination of benefits provision noted in the margin.[1] Also defendants have made available and have written since August of 1964, group hospital and group medical or surgical service plan contracts without coordination of benefits provisions, and a substantial number of subscribers are now covered by such group contracts.

---

[1] " 'Exclusions' is hereby amended by adding thereto a further exclusion of services, as paragraph (i), for which no benefits would be provided:

"Services of supplies furnished to a subscriber or paid under any of the following plans or insurance coverages; (1) any plan, program or insurance policy provided through a group arrangement including, but not limited to, any to which an employer contributes or makes payroll deductions; (2) any contract issued by this Plan or any other Blue Cross or Blue Shield Plan; or (3) any coverage under a plan or law of any federal, state or other government or any political subdivision thereof."

The initiation by the defendants of the use of COB provisions was done without any intent to harm the plaintiff's business, but rather it was put into use so that the defendants could remain competitive in the field of broad risk group health and accident insurance. The record discloses that defendants and other Blue Cross/Blue Shield plans adopted COB provisions in order to avoid always paying first under the "dumping clause" of the model COB provision which was adopted on a widespread basis by the private insurance industry beginning in 1963 and 1964. This "dumping clause" is precisely that portion of the COB clause about which plaintiff complains. The plaintiff feels the alleged boycott is concretely illustrated by the action of the defendants on Miami Beach. Since January 1967, the defendants have provided group health and accident insurance coverage for the employees of the City of Miami Beach and the contract with the city includes a provision for coordination of benefits. The bid specification of the City of Miami Beach required a provision for coordination of benefits "of any other group insurance policy." Although there is a serious question as to whether the plaintiff sells group insurance as that term is used in the defendants' insurance contract with the Miami Beach City employees, they elected to apply it to the plaintiff's cancer policy because it was sold through a franchise group (payroll payment) plan. The practical effect of this is that the defendants obtain "free" reinsurance at the expense of their insured's employees. Since the employees paid two premiums to receive only one benefit which they would have received anyway for the payment of one premium under the defendants' policy, individuals who have purchased AFL cancer policies through a franchise

group plan will in most instances either cancel their policies or allow them to lapse upon learning of this situation. This is precisely what occurred on Miami Beach when 58 of the 119 policy holders covered by the defendants' group policy with the city either cancelled or allowed their AFL cancer policies to lapse. A single-risk policy such as the AFL Cancer Plan covers only one risk of disease in the vast market of policies covering medical risks, and the number of times the Blue Cross/Blue Shield COB provision is applied against plaintiff's policy is necessarily minuscule as compared with the payments made under the broad-risk policies. This is true since a concurrence of three factors must occur before such an application of COB is made by the defendants. The insured must be covered by the plaintiff's policy and that of the defendants, and the insured must have purchased his cancer risk policy from the plaintiff through a franchise group (payroll payment) plan. However, it is this application which the plaintiff deems to constitute a boycott in restraint of trade within the terms of Section 1 of the Sherman Act.

The defendants have from the very beginning of this lawsuit contested this interpretation of Section 1 and took the position that without competition between plaintiff and the defendants there can be no violation of Section 1 because there is no restriction or abridgement of competition in the market. The defendants jointly engage in competition with commercial insurance companies engaged in the general (broad risk hospital and medical expense) health and accident insurance business. However, as AFL's President, John B. Amos, testified at trial, his company does not engage in competition with the defendants in the general health and accident insurance business in Florida.

Plaintiff does not sell cancer policies in Florida in competition with the defendants, nor does the plaintiff market or attempt to sell or write cancer policies in Florida as a substitute for insurance coverage sold in Florida by the defendants. Also the defendants have never written or offered for sale riders to their service plans covering the single risk of cancer, nor have they sought or applied for authorization of the Insurance Commissioner of Florida to do so. The defendants buttressed their argument with an exhaustive list of cases illustrative of violations of Section 1 in which there was competition between plaintiff and defendants, but neglected to put forth *Apex Hosiery Company* v. *Leader*, 1940, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, which the Court feels incisively supports their contention. See also *Prepmore Apparel, Inc.* v. *Amalgamated Clothing Workers of America*, 431 F.2d 1004 (CA5, 1970).

Factually, *Apex* is dissimilar with the present case, however, the Supreme Court in trying to decide the applicability of the broad literal terms of Section 1 to a violent strike and take over by union members which had shut down the entire production of a hosiery mill and blocked substantial hosiery shipments from interstate commerce, were also faced with the essential question of whether competition was necessary to a restraint of trade violation within the act. Obviously, the labor union's actions fell within the literal terms of "restraint of trade" since the union had stopped production and shipment of products destined to be sold in interstate trade. However, after a thorough examination of the Congressional history and prior judicial construction of that imprecise phrase, the Court found the union's reprehensible actions were not

cognizable by Section 1 of the Sherman Act because their actions were not aimed at controlling or restricting competition in the market place. The Court said that it had "never applied the Sherman Act in any case whether or not involving labor organizations or activities, unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods and services. . . . " The "rule of reason" which is the cornerstone of modern antitrust law was found to be based upon the common law meanings of illegal restraint of trade. The Court stated,

> ". . . in thus grounding the 'rule of reason' upon the analogy of the common law doctrines applicable to illegal restraints of trade, the Court gave a content and meaning to the statute in harmony with its history and plainly indicated by its legislative purpose. Labor cases apart, which will presently be discussed, this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition. In the cases considered by this Court since the Standard Oil Co. case in 1911 some form of restraint of commercial competition has been the sine qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act. . . . "

Since this interpretation makes restriction of competition a necessary element of an illegal restraint of trade, the plaintiff is without a remedy under Section 1 of the Sherman Act. The effect on the plaintiff's business, which is

non-competitive in Florida with that of the defendants', is only a side effect of a move made by the defendants to enable them to remain competitive in their own market. As the evidence of its recent remarkable growth in spite of the general use of coordination of benefits goes far to support, the plaintiff is not driven out of his market in cancer risk insurance. He is simply precluded from the marketing method of selling his cancer policies by the franchise (payroll payment) plan when the prospective buyers are already covered by a broad risk carrier using coordination of benefits in its coverage. However, the plaintiff still has access to that particular class of prospective buyers since coordination of benefits are not applied against his policies by broad risk carriers covering the same risk when those policies were sold by a method other than through the franchise group plan. Therefore, the Court holds that the defendants' application of their coordination of benefits provisions to the cancer risk policies sold by the plaintiff on a franchise (payroll) group basis does not violate Section 1 of the Sherman Act. This ruling is limited to the plaintiff's antitrust claim before this Court and is not intended to a ruling on any other claim for relief, if any, the plaintiff may have against these defendants. It is

ORDERED AND ADJUDGED that the plaintiff's claim for injunction, nominal damages and attorneys fees is denied and this cause is hereby dismissed with prejudice.

DONE AND ORDERED at Miami, Florida this 21st day of July, 1972.

PETER T. FAY
United States District Judge

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 11 1974
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM, 1973

No. 73-1172

AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS,

Petitioner,

vs.

BLUE CROSS OF FLORIDA, INC. and BLUE SHIELD OF FLORIDA, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Blue Cross of Florida, Inc. and Blue Shield of Florida, Inc. respectfully submit this brief in opposition to the Petition of American Family Life Assur-

ance Company of Columbus for a writ of certiorari and pray that the Petition be denied by this Court.

STATUTES INVOLVED

Petitioner omitted from its statement of "Statutory Provisions Involved" two provisions of the McCarran-Ferguson Act, and Chapter 641 of the Florida Statutes.

(1) Section 1 of the McCarran-Ferguson Act, 15 U.S.C. § 1011 (59 Stat. 33) provides:

> "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

(2) Section 2(a) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(a) (59 Stat. 33) provides:

> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

(3) Chapter 641 of the Florida Statutes, provides in pertinent part:*

*Chapter 641 of the Florida Statutes, in its entirety, establishes a comprehensive system of State regulation of nonprofit hospital and medical service plans.

(a) ". . . nonprofit medical or surgical or hospital service plan or plans in the state . . . shall be governed by this law and subject to regulation and supervision by the department of insurance and all provisions of the laws of Florida applicable to health, sick or accident insurance . . ." Chapter 641.01, Florida Statutes.

(b) "The department of insurance shall issue a certificate of authority . . . upon being satisfied . . . that each contract issued or proposed to be issued to subscribers to the plan, is in a form approved by the department of insurance and that the rates charged or proposed to be charged for each form of such contract and benefits to be provided, are fair and reasonable." Chapter 641.04(3)(c), Florida Statutes.

QUESTIONS PRESENTED

The "Questions Presented" as stated by the petitioner do not fairly arise from the record in or the decisions of the courts below. Petitioner's questions 1 and 3, directed to the question of the existence of an alleged boycott, attempt to present essentially factual contentions Petitioner unsuccessfully urged below. Petitioner's questions 2, 4 and 5 attempt to advance propositions of

law based on the missing and essential predicate, negated by the record, of the existence of an alleged boycott.

In Respondents' view, because all five of petitioner's proposed questions arise from its alleged claim of boycott, and the Courts below did not find the existence of or discuss the legal consequences of such an alleged boycott, the only possible question presented by this case, emerging not from the findings or opinions of the Courts below but from petitioner's contentions, is whether the indirect side effect of a group insurance policy provision excluding benefits for expenses paid for under another policy, as a matter of law, constitutes a boycott illegal *per se* in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

STATEMENT OF THE CASE

(1) Petitioner's Statement.

Petitioner's Statement of the Case is based almost exclusively upon its own peculiar and highly subjective characterization of selected facts, and has no reasonable relation to the findings of fact by the District Court or the opinions of the District Court and the Court of Appeals. Petitioner, for a few typical examples: (1) states that it is "typical of the non-COB carriers" (Pet. p. 5) although it stated in the Court below that "the only company plaintiff is aware of which [is] boycotted and excluded . . . is plaintiff itself." (App. 590); (2) states that the District Court found that "respondents themselves adopted COB because they had felt its exclusionary effect" (Pet. p. 6) although the District Court, to the contrary, found "it

[COB] was put into use so that defendants could remain competitive" (Pet. App. p. 17a); (3) states that the Court of Appeals "found that COB excluded petitioner from the market"* (Pet. p. 6) although the Court of Appeals, in fact, made no such finding and, to the contrary, expressly described the effect of COB as "tough competition" which passes savings on to consumers and reduces the cost of respondents broad risk coverage to the insured (Pet. App. p. 10a); and (4) petitioner refers to "the COB boycott" (Pet. p. 6) as if petitioner's creative alleged boycott claim had been sustained whereas, in fact, it was rejected by the Courts below.

Petitioner's "Statement of the Case" assembles a vast conspiracy out of thin air, in total disregard of the actual finding of facts in the Courts below.

(2) Respondents' Statement.

As the Court of Appeals stated:

> "The American Family Life Assurance Company of Columbus, Georgia, sued Blue Cross and Blue Shield of Florida. The complaint charged that enforcement of a 'coordination of benefits' provision contained in defendants' plans for hospital and surgical benefits violated Section 1 of the Sherman Act, 15 U.S.C. §1. Specificially, it was urged that the practice constituted boycott,

*In the face of widespread use of COB, Petitioner's growth rate in fact, has increased so that each year for the past several years it has grown faster than the year before (App. 2245). Its earnings increased 204% in 1971 (App. 3802).

coercion, intimidation, and other prohibited restraints of trade. A plan covering the municipal employees of Miami Beach was especially challenged.

* * *

"The primary business of American Family Life is the sale of cancer plan insurance policies which provide for payment solely in the event of certain expenses incurred in connection with a confirmed diagnosis of cancer. Such payments are made regardless of any benefits paid on the same risk by other insurance companies.

"Blue Cross, a non-profit corporation, operates a hospital service plan.

"Blue Shield, likewise a non-profit corporation, operates a medical or surgical plan.

"Although there is some cavil to the contrary, both of these defendants are clearly subject to the supervision and regulation of the Florida Department of Insurance.

"The coordination of benefits, sometimes referred to as 'COB', is at the heart of the controversy. COB simply means that if the same hospital, surgical, or medical risk is covered by more than one insurance carrier then the company insuring with a COB provision in its policies may reduce the amount of its payments by that

payable from some other coverage. In other words, the claimant may not recover twice for the same expenses. If more than one policy of insurance has a COB provision then the primary carrier rule is applied."

The District Court described COB as follows:

Adoption of a model COB provision was recommended in December 1962 by four trade associations of private health insurance companies, namely, the Health Insurance Association of America, the Life Insurance Association of America, the American Life Convention, and the Health Insurance Council. COB has as its primary characteristic a structure of priority of claim payments which enables *broad risk accident and health insurance carriers* to reduce the amount of premiums paid out by limiting the claimants to a single payment of benefits for a single medical risk.

"If two or more policies would result in payment for more than 100% of the expenses, then coordination of benefits is applied. If, therefore, as is not infrequently the case in the event of a serious injury or illness, two or more policies, with or without coordination of benefits, provide together total benefits less than the expenses, coordination is not applied. For example, if as a result of a serious illness, hospital and medical expenses of $10,000 are incurred, and under two group policies a total of $7,500 is available, co-

ordination of benefits would not apply at all. If hospital and medical expenses of $1,000 are incurred and $800 is available under one policy and $800 under another, and if either one or both of the policies have a coordination of benefits clause, then rather than paying $1,600, the total benefits under both policies would be limited to $1,000 by application of the coordination of benefits clause or clauses.

"When both policies have a coordination of benefits clause, then an order of benefits rule — the primary carrier rule — is applied. Under these rules, for example, the husband's carrier is considered primary and the wife's carrier secondary so that in the example, the husband's carrier would pay $800 and the wife's carrier would pay only $200 to bring the total up to 100%. When only one of the policies has a coordination of benefits clause, then the carrier without a coordination of benefits clause, such as the plaintiff, would always be deemed primary. This is known as the automatic primary rule or the dumping clause.

"The carrier without a coordination of benefits clause pays no more in that event than it has obligated itself to pay by its policy contract and the operation of the automatic primary rule or dumping clause cannot cause such a company to pay more than it would pay whether or not

the other company had a coordination of benefits clause.

"With the approval of the Insurance Commissioner of Florida (as the District Court found), the appellees began to write group hospital and group medical or surgical service plans with a coordination of benefits provision. They have continued also to write this coverage without coordination of benefits provisions and a substantial number of subscribers are covered by such group contracts.

The District Court expressly found that the initiation of the COB provisions was done without any intent to harm the plaintiff's business, but rather was done so that Blue Cross and Blue Shield could remain competitive in the field of broad risk group health and accident insurance; the purpose was to avoid always paying first under the "dumping clause" of the model COB provision which had been adopted on a widespread basis by the private insurance industry in 1963 and 1964. The "dumping clause" is the portion of the Blue Cross-Blue Shield COB plan to which American Family Life objects.

American Family Life contends that its allegations of boycott are supported by what took place in Miami Beach. Since January, 1967, the appellees have provided group health and accident insurance coverage for the employees of the City of Miami Beach. The contract with the city includes a COB provision, so required by the city in its specifications for bids on the coverage."

After a non-jury trial on the merits, the District Court dismissed the complaint and, in an unanimous

decision now reported at 486 F.2d 225, the Court of Appeals affirmed. The Court of Appeals held:

> "We think the correct standard for the determination of the issue now before us was enunciated by the Third Circuit in The Travelers Insurance Company v. Blue Cross of Western Pennsylvania, 481 F.2d 80:
>
> > 'The anti trust laws, however, project competition, not competitors; and stiff competition is encouraged, not condemned.'
>
> 'This statement was preceeded by the observation that:'
>
> > 'In its negotiating with hospitals, Blue Cross has done no more than conduct its business as every national enterprise does, i.e., get the best deal possible * * * Blue Cross passes along the saving thus realized to consumers.'
>
> "That is the situation here. American Family Life does not write broad coverage hospital and medical insurance. Blue Cross-Blue Shield do write such coverage. American Family Life sells cancer plan policies. Blue Cross-Blue Shield writes such coverage only as incidental to or as a part of its broad coverage which protects the insured as to many diseases or disabilities. When they include COB in their policies these companies are simply providing that to a certain

extent they shall not make the payments received or to be received from some other insurance policy, thus reducing the cost of their broad risk coverage as well as its cost to the insured.*

"This may be tough competition for American Family Life, which chooses to concentrate on only one dread risk, but the test is whether any restraint of trade thus caused is reasonable, Northern Pacific Railway Company v. United States, 356 U.S. 1 (1958). In our opinion, there is no logical way in the context of this case which the COB provisions can be pronounced "unreasonable". We cannot say under §1 of the Sherman Act that an insurance company insuring against only one risk is entitled to dictate the terms upon which broad risk companies may offer their benefits to those individuals who need protection against many risks.

"Stated another way, may the Blue Cross-Blue Shield COB provisions be invalidated under the Sherman Act so that American Family Life may

*The rates for Blue Cross-Blue Shield group contracts are based on the experience of the group (App. 972-973; 1074-1075; 1752-1753; 2206-2207). Savings from the application of COB, therefore reduce premiums (App. 2206-2207). Through the application of COB, Blue Cross and Blue Shield saved $5,545,123.01 in 1971 (Defendants Ex. 27, App. 3796), and therefore, without reducing any subscribers benefits to less than 100% of covered expenses, charged their subscribers $5,545,123.01 less for their Blue Cross-Blue Shield coverage in 1971. As the Deputy Insurance Commissioner testified, "The purpose of it [COB] is to reduce excess payment of claims [in excess of 100% of expenses] and correspondingly to reduce the premium being paid by the group policyholder." (App. 2143-2144).

write its cancer policies in the form it desires while at the same time denying the same right to Blue Cross-Blue Shield as to broad coverage? We think not, and we so hold.

"While the District Court apparently chose to base its dismissal on "no competition", we base ours on the view that the record fails to reflect any prohibited competition.

"In this context we attribute no controversial significance to what occurred as to the contract with the City of Miami Beach. There the insurer [was] asked for bids on coverage that would include COB provisions. American Family Life did not offer a bid. It does not write the type of insurance which the purchasers desired."

ARGUMENT

Petitioner's arguments not only bear no reasonable relation to the record in or decisions of the Courts below but are equally without foundation in fact. As one typical example, petitioner states that:

"The grim fact of life confronting non-COB carriers is that if they can't or won't join, *they themselves must pay the claims otherwise paid* by the numerous and dominant COB carriers." (Pet. p. 8)

In fact, as the Deputy Insurance Commissioner testified:

> "Q. Mr. Alexander, Mr. Hoffmann asked you about what happens to the carrier without a coordination of benefits clause.
>
> Does such a carrier, because of the coordination of benefits, pay one cent more than it has obligated itself to pay by its contract?
>
> "A. No, it pays its regular benefits in the contract." (App. 2183)

and the District Court found:

> "The carrier without a coordination of benefits clause pays no more in that event than it has obligated itself to pay by its policy contract and the operation of the automatic primary rule or dumping clause cannot cause such a company to pay more than it would pay whether or not the other company had a coordination of benefits clause." (App. 2355)

The use of COB with the approval of the State, at the instance of the group insurance customer, resulting in lower premiums, simply cannot be fairly or accurately characterized as a refusal to deal.

1. The McCarran Act: State Regulation and Approval of COB.

Petitioner seeks to nullify the McCarran Act, 15 U.S.C. §§ 1010-1013, by explosion of the boycott exception, 15 U.S.C. § 1013(b), to complete coverage of the very core of the business of insurance. In petitioner's view, the McCarran Act notwithstanding, to adhere to the Sherman Act's prohibition of boycotts, insurers must design their policies, irrespective of the wishes of the insured or the resulting increase in prices, to maximize marketability of petitioner's remarkably profitable product.*

The McCarran Act, 15 U.S.C. §§ 1010-1013, declares "the business of insurance" exempt from the antitrust laws except for the Sherman Act's prohibition of boycotts, coercion or intimidation (15 U.S.C. § 1013(b)). As the Supreme Court stated in *S.E.C. v. National Securities*, 393 U.S. 453, 459, 21 L.Ed.2d 668, 676, 89 S.Ct. 564 (1969):

> "The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation,"
>
> * * *
>
> "Congress was concerned with the type of state regulation which centers around the contract of insurance, the transaction which Paul v.

*Petitioner pays out only 39% of its premium dollar in benefits (App. 526-528). Respondents, in contrast, pay out 95% of their total income in benefits (App. 126; App. 142-146). Most people buy cancer coverage out of fear. (e.g. App. 1942, 1944-46) Petitioner's "social utility" argument (Pet. p. 11) is irrelevant hyprocrisy.

> Virginia held was not 'commerce'. The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement — these were at the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was — it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, drectly or indirectly, are laws regulating the 'business of insurance.' " S.E.C. v. National Securities, 393 U.S. 453, 459, 21 L.Ed.2d 668, 676 (1969)

This case deals with the type of policy that may be issued and its enforcement — the "core of 'the business of insurance' ".

As the District Court found and the Court of Appeals stated, the use of COB was specifically approved by the Department of Insurance of Florida (App. 2144-2151, Defendants Ex. 9, App. 3593).

Under the McCarran Act, differing state policies concerning COB have developed. As petitioner's President Amos testified:

> "Q. Some states are in favor of it, other states are against it; is that a fair statement, sir?

"A. Yes, that's a fair statement. Some commissioners agree with it, and some totally disagree." (App. 2245)

2. Consumer Choice.

Petitioner has chosen the City of Miami Beach group policy as its example of the use of COB (Pet. p. 5, Pet. App. 2a, 5a, 6a, 7a and 17a). As the Court of Appeals stated:

> American Family Life contends that its allegations of boycott are supported by what took place in Miami Beach. Since January, 1967, the appellees have provided group health and accident insurance coverage for the employees of the City of Miami Beach. The contract with the city includes a COB provision, so required by the city in its specifications for bids on the coverage.
>
> (Pet. App. 5a; App. 752)

Respondents offer group policies to the public with or without COB (Pet. App. 4a-5a; Stipulated Facts, paragraph 13, App. 752). The choice of whether to include COB in a group contract rests, as it should in a free economy, upon the consumer. Petitioner argues that the Sherman Act may be employed to deny to the many group customers such as the City of Miami Beach (Pet. App. 4a, 5a; App. 752), Southern Bell (Pet. App. 15a, 16a; App 750) and the Federal Government, (App. 3313 at 3319), who have demanded the inclusion of COB in

their policies in order to achieve the resultant reduction in cost and price, the trade freedom to determine the terms of their own insurance policies.*

3. Boycotts or Joint Refusals to Deal Under The Sherman Act.

Petitioner alleged, as the District Court stated:

> "Both alleged conspiracies to boycott allegedly have as their purpose and effect to exclude the plaintiff from vast segments of the market . . ."

Petitioner totally failed to prove, as it alleged, that respondents employed COB for the purpose and effect of excluding petitioner from the market. As the District Court found:

> "The initiation by the defendants of the use of COB provisions was done without any intent to harm the plaintiff's business, but rather it was put into use so that the defendants could remain competitive in the field of broad risk group health and accident insurance." (Pet. App. 17a)

> "The effect on the plaintiff's business, which is non-competitive in Florida with that of the defendants', is only a side effect of a move made

*The City of Miami Beach, by requiring COB by their specifications, according to petitioner, is a "co-conspirator" (App. 1963). The Comptroller General of the United States (App. 3714-3740) for recommending COB and the Federal Government, for requiring COB in the Federal Employees Program (App. 3313 at 3319; see also App. 117-119) must by the same reasoning also be "co-conspirators."

> by the defendants to enable them to remain competitive in their own market." (Pet. App. 21a)

In the Court of Appeals, Petitioner continued to maintain that purpose and intent were determinative. As the Court of Appeals pointed out, petitioner argued there that the District Court's findings that respondents did not intend to injure petitioner were "clearly erroneous" (Pet. App. 8a; Point IV in Brief in Court of Appeals). Now, after the petitioner failed to prove its allegations, and after adverse findings of fact in the District Court and after rejection of its position in the Court of Appeals, the Petitioner advances for the first time in this Court the contention that purpose and intent are immaterial.

Petitioner sets forth long strings of citations, but no analysis, of the group refusal to deal or boycott decisions of this Court. It confuses the question of whether, in the first instance, a boycott within the meaning of the Sherman Act exists with the question of whether, given such a refusal to deal or boycott, an alleged good motive is a defense. The first decision of this Court describing the economic weapon of a collective refusal to deal as a boycott illegal *per se, Fashion Originators Guild of America v. F.T.C.*, 312 U.S. 457, 85 L.Ed 949, 61 S.Ct. 703 (1941), furnishes a perfect example of this vital distinction obscured by petitioner's simplistic approach. In *Fashion Originators Guild*, members of the combination, to combat what they called unethical and immoral style piracy, implemented a plan which had:

> ". . . both as its necessary tendency and as its *purpose and effect the direct suppression of com-*

> *petition* from the sale of unregistered textiles and copied designs . . ." 312 U.S. at 465

by declining to sell their products to retailers who sold garments copied from the designs of members (312 U.S. at 464). Members of the Guild:

> ". . . combined among themselves to combat and, if possible, destroy all competition from the sale of garments which are copies of their 'original creations'. They admit that to destroy such competition they have in combination purposely boycotted and declined to sell their products to retailers who follow a policy of selling garments copied by other manufacturers from designs put out by Guild members." (312 U.S. 357 at 461)

After finding the combination for the purpose of destruction of competition from those who copied original designs a boycott in violation of the Sherman Act, the Court held that the reasonableness of opposition to the style pirates and the question of whether systematic copying of designs was tortious were not defenses. The Court did not in any way hold that the purpose of the combination was immaterial or, as petitioner contends, that an adverse side effect of the pursuit of otherwise lawful business objectives constitutes a boycott illegal *per se*.

The other decisions of this Court cited by petitioner similarly do not support its thesis. Each of these cases involve a collective refusal to deal for the purpose of stifling or eliminating competition, or as *Northern Pacific Railway v. United States,* 356 U.S. 1, 2 L.Ed.2d 545, 78

S.Ct. 514 (1958), deal with other Sherman Act violations and refer to boycotts as involved *Fashion Originators Guild* as examples of *per se* violations. For example, *White Motor Co. v. United States,* 372 U.S. 253, 9 L.Ed.2d 738, 83 S.Ct. 696 (1963) described group boycotts as illegal *per se* because they are "naked restraints of trade with no purpose except stifling competition", 372 U.S. at 263, and *Associated Press v. United States,* 326 U.S. 1, 89 L.Ed. 2013, 65 S.Ct. 1416 (1945) involved By-Laws "designed to stifle competition in the newspaper publishing field." 326 U.S. at 11.

None of the 43 cases cited by petitioner supports its basic contention that the incidental adverse side effect of an action taken in furtherance of competition in response to the demands of the market place, and which secures the benefits of competition in the tangible form of lower prices, constitutes a boycott illegal *per se in* violation of Section 1 of the Sherman Act.

Should petitioner's thesis be accepted, then the Sherman Act would no longer be a "charter of economic liberty", *Northern Pacific Railway Company v. United States,* 356 U.S. 1, 2 L.Ed.2d 545, 78 S.Ct. 514 (1958), but would instead compel respondents and its group customers to surrender their own trade freedom and sacrifice their own legitimate interest in the best broad risk group insurance at the lowest possible price in order to maximize the market for petitioner's non-competitive product. The implications of petitioner's contention are staggering. It argues that the presence of what it calls "exclusionary effect" is conclusive evidence of a *per se* violation of the

Sherman Act. If such "exclusionary effect" although a side effect is conclusive, then by petitioner's reasoning, the joint action of an employer and insurer in providing group insurance coverage for employees would be itself a boycott because it has an "exclusionary effect" by reducing the marketability of any individual health insurance policy in a market consisting of employees covered by the group policy. Similarly, under petitioner's theory, the American Cancer Society and the medical research teams it supports are engaged in a not yet successful boycott of petitioner's dread disease cancer policies.

Stripped of overblown facts and strings of inapplicable citations without analysis, petitioner's case does not present a substantial question for resolution by this Court. The action of respondents simply cannot be fairly characterized as a group refusal to deal or boycott. The intricate group boycott questions posed by the petitioner are not based on the record in or decisions of the Courts below.

4. The Decision of the Court of Appeals.

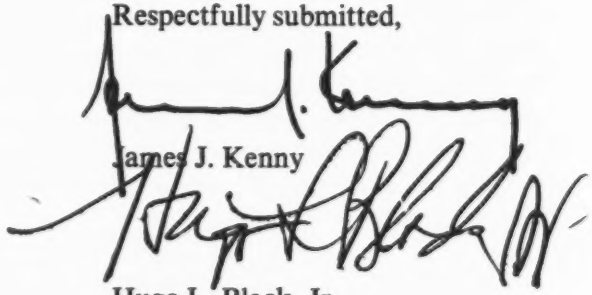
For reasons well stated in the opinion of the Court of Appeals, petitioner's contentions were rejected. As in this case, the plaintiff in *Travelers Insurance Company v. Blue Cross of Western Pennsylvania,* 481 F.2d 80 (3 Cir. 1973), cert. denied December 10, 1973, ____ U.S. ____, 38 L.Ed.2d 550, cited by the Court of Appeals, contended that the terms of State approved contracts, while there with hospitals and in the instant case with subscribers, amounted to boycott, coercion or intimidation within the exception to the McCarran Act, 15 U.S.C. § 1013(b). As the Court

of Appeals stated, relying upon the *Travelers* case and upon well established principles, the antitrust laws protect competition, not competitors. Respondents use of COB, at the instance of the consumer, has reduced the cost of respondents broad risk coverage. The antitrust laws are designed in the public interest to secure, not to prohibit, the benefits of competition in the form of lower prices.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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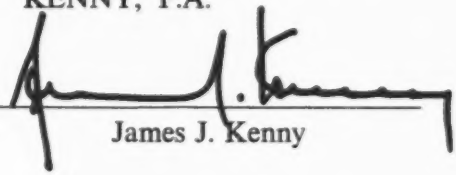
CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served with the foregoing Brief in Opposition to Petition for Writ of Certiorari, by depositing three copies in a United States mail box, with air mail postage prepaid, addressed to Malcolm A. Hoffman, Law Firm of Malcolm A. Hoffman, 12 East 41st Street, New York, New York 10017, in accordance with Section 1 of Rule 33 on this 8th day of March, 1974.

KELLY, BLACK, BLACK & KENNY, P.A.

By 

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